

Introduced by Senator Margett

February 24, 2006

An act to repeal Section 53068 of the Government Code, and to amend Sections 3400, 4104.5, 7105, and 7106 of, and to add Section 7111 to, the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 1604, as introduced, Margett. Public contracts: bids and disputes.

(1) Existing law requires a public entity taking bids for construction of a public work or improvement to establish a date and time for submission of bids by prime contractors, and provides that bids submitted after the bid submittal deadline must be returned unopened.

This bill would make a technical change to these provisions by repealing a duplicative provision in the Government Code that already exists in the Public Contract Code.

(2) Existing law prohibits, except in specified circumstances, a state agency, political subdivision, municipal corporation, district, or public officer responsible for letting a public works contract from drafting bid specifications for that contract in a manner that limits the bidding to any one concern or product, unless the specification is followed by the words "or equal." Existing law requires that these bid specifications provide a period of time prior to or after, or prior to and after, the award of the contract to allow the contractor to submit data that demonstrates that a concern or product to be provided under the contract is equal to the concern or product identified in the bid specification.

This bill would instead require that these bid specifications provide a period of time after the award of the contract to allow the contractor to submit data that demonstrates that a concern or product to be

provided under the contract is equal to the concern or product identified in the bid specification.

(3) Existing law provides that construction contracts of public agencies, as defined, may not require the contractor to be responsible for the cost of repairing or restoring damage, if the damage was proximately caused by an act of God, as defined, to the work done by the contractor in excess of 5% of the contracted amounts, as specified.

This bill would replace the term “public agencies” with a term “public entities” and would make other nonsubstantive, technical changes to those provisions.

(4) Existing public contract law requires any public works contract of any public entity to include an affidavit, as specified, affirming that the bidder has not participated in various collusive activities.

This bill would, instead, require the contracts to include a declaration under penalty of perjury that the bidder has not participated in various collusive activities, as provided. In its application to local agencies, this bill would create a state-mandated local program.

(5) Existing law provides that, with respect to construction contracts for works of improvement, public agencies may make changes in those contracts, as specified, and authorizes a public agency, other than the state, to terminate, amend, or modify any contract within the scope of the authority vested in the agency, as provided.

This bill would renumber those provisions without making any substantive changes.

(6) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 53068 of the Government Code is repealed.

~~53068. Any local agency, as defined in Section 54951 of the Government Code, which seeks to enter a contract that requires the letting of bids, shall specify in the public notice the place such bids are to be received and the time by which they shall be received. Any bids received by such local agency after the time specified in the notice shall be returned unopened.~~

SEC. 2. Section 3400 of the Public Contract Code is amended to read:

3400. (a) No agency of the state, nor any political subdivision, municipal corporation, or district, nor any public officer or person charged with the letting of contracts for the construction, alteration, or repair of public works, shall draft or cause to be drafted specifications for bids, in connection with the construction, alteration, or repair of public works, (1) in a manner that limits the bidding, directly or indirectly, to any one specific concern, or (2) calling for a designated material, product, thing, or service by specific brand or trade name unless the specification is followed by the words “or equal” so that bidders may furnish any equal material, product, thing, or service. In applying this section, the specifying agency shall, if aware of an equal product manufactured in this state, name that product in the specification. Specifications shall provide a period of time ~~prior to or after, or prior to and after,~~ *after* the award of the contract for submission of data substantiating a request for a substitution of “an equal” item. If no time period is specified, data may be submitted any time within 35 days after the award of the contract.

(b) Subdivision (a) is not applicable if the awarding authority, or its designee, makes a finding that is described in the invitation for bids or request for proposals that a particular material, product, thing, or service is designated by specific brand or trade name for any of the following purposes:

(1) In order that a field test or experiment may be made to determine the product’s suitability for future use.

(2) In order to match other products in use on a particular public improvement either completed or in the course of completion.

(3) In order to obtain a necessary item that is only available from one source.

(4) (A) In order to respond to an emergency declared by a local agency, but only if the declaration is approved by a four-fifths vote of the governing board of the local agency issuing the invitation for bid or request for proposals.

(B) In order to respond to an emergency declared by the state, a state agency, or political subdivision of the state, but only if the facts setting forth the reasons for the finding of the emergency are contained in the public records of the authority issuing the invitation for bid or request for proposals.

SEC. 3. Section 4104.5 of the Public Contract Code is amended to read:

4104.5. (a) The officer, department, board, or commission taking bids for construction of any public work or improvement shall specify in the bid invitation and public notice the place the bids of the prime contractors are to be received and the time by which they shall be received. The date and time shall be extended by no less than 72 hours if the officer, department, board, or commission issues any material changes, additions, or deletions to the invitation later than 72 hours prior to the bid closing. ~~Any~~

(b) ~~Any~~ bids received after the time specified in the notice or any extension due to material changes shall be returned unopened.

~~(b)~~

(c) As used in this section, the term “material change” means a change with a substantial cost impact on the total bid as determined by the awarding agency.

~~(e)~~

(d) As used in this section, the term “bid invitation” shall include any documents issued to prime contractors that contain descriptions of the work to be bid or the content, form, or manner of submission of bids by bidders.

SEC. 4. Section 7105 of the Public Contract Code is amended to read:

7105. (a) Construction contracts of public ~~agencies~~ *entities* shall not require the contractor to be responsible for the cost of

1 repairing or restoring damage to the work, which damage is
2 determined to have been proximately caused by an act of God, in
3 excess of 5 percent of the contracted amount, provided, that the
4 work damaged is built in accordance with accepted and
5 applicable building standards and the plans and specifications of
6 the awarding authority. However, contracts may include
7 provisions for terminating the contract. The requirements of this
8 section shall not be mandatory as to construction contracts
9 financed by revenue bonds. This section shall not prohibit a
10 public-agency entity from requiring that a contractor obtain
11 insurance to indemnify the public-agency entity for any damage
12 to the work caused by an act of God if the insurance premium is
13 a separate bid item. If insurance is required, requests for bids
14 issued by public-agencies entities shall set forth the amount of the
15 work to be covered and the contract resulting from the requests
16 for bids shall require that the contractor furnish evidence of
17 satisfactory insurance coverage to the public-agency entity prior
18 to execution of the contract.

19 (b) For the purposes of this section, *“acts of God” shall*
20 *include only the following occurrences or conditions and effects:*
21 *earthquakes in excess of a magnitude of 3.5 on the Richter Scale*
22 *and tidal waves.*

23 (1) ~~“Public agency” shall include the state, the Regents of the~~
24 ~~University of California, a city, county, district, public authority,~~
25 ~~public agency, municipal utility, and any other political~~
26 ~~subdivision or public corporation of the state.~~

27 (2) ~~“Acts of God” shall include only the following occurrences~~
28 ~~or conditions and effects: earthquakes in excess of a magnitude~~
29 ~~of 3.5 on the Richter Scale and tidal waves.~~

30 (e) ~~Public agencies may make changes in construction~~
31 ~~contracts for public improvements in the course of construction~~
32 ~~to bring the completed improvements into compliance with~~
33 ~~environmental requirements or standards established by state and~~
34 ~~federal statutes and regulations enacted after the contract has~~
35 ~~been awarded or entered into. The contractor shall be paid for the~~
36 ~~changes in accordance with the provisions of the contract~~
37 ~~governing payment for changes in the work or, if no provisions~~
38 ~~are set forth in the contract, payment shall be as agreed to by the~~
39 ~~parties.~~

~~(d) (1) Where authority to contract is vested in any public agency, excluding the state, the authority shall include the power, by mutual consent of the contracting parties, to terminate, amend, or modify any contract within the scope of such authority.~~

~~(2) Paragraph (1) shall not apply to contracts entered into pursuant to any statute expressly requiring that contracts be let or awarded on the basis of competitive bids. Contracts of public agencies, excluding the state, required to be let or awarded on the basis of competitive bids pursuant to any statute may be terminated, amended, or modified only if the termination, amendment, or modification is so provided in the contract or is authorized under provision of law other than this subdivision. The compensation payable, if any, for amendments and modifications shall be determined as provided in the contract. The compensation payable, if any, in the event the contract is so terminated shall be determined as provided in the contract or applicable statutory provision providing for the termination.~~

~~(3) Contracts of public agencies may include provisions for termination for environmental considerations at the discretion of the public agencies.~~

SEC. 5. Section 7106 of the Public Contract Code is amended to read:

7106. Any public works contract of a public entity shall include ~~an affidavit~~ *a declaration under penalty of perjury under the laws of the State of California*, in the following form:

“NONCOLLUSION-AFFIDAVIT DECLARATION UNDER PENALTY OF
PERJURY TO BE EXECUTED BY
BIDDER AND SUBMITTED WITH BID

State of California }
County of _____ } ss.

_____, being first duly sworn, deposes and says that he or she is _____ of _____

“I declare that I am the duly authorized representative of the party making the foregoing bid; that the bid is not made in the interest of, or on behalf of, any undisclosed person, partnership, company, association, organization, or corporation; that the bid is genuine and not collusive or sham; that the bidder has not directly or indirectly induced or solicited any other bidder to put

1 in a false or sham bid, and has not directly or indirectly colluded,
2 conspired, connived, or agreed with any bidder or anyone else to
3 put in a sham bid, or ~~that anyone shall~~ to refrain from bidding;
4 that the bidder has not in any manner, directly or indirectly,
5 sought by agreement, communication, or conference with anyone
6 to fix the bid price of the bidder or any other bidder, ~~or to fix any~~
7 ~~overhead, profit, or cost element of the bid price, or of that of any~~
8 ~~other bidder, or to secure any advantage against the public body~~
9 ~~awarding the contract of anyone interested in the proposed~~
10 ~~contract; that all statements contained in the bid are true; and;~~
11 ~~further,~~ that the bidder has not, directly or indirectly, submitted
12 his or her bid price or any breakdown thereof, or the contents
13 thereof, or divulged information or data relative thereto, or paid,
14 ~~and will not or agreed to~~ pay, any fee to any corporation,
15 partnership, company association, organization, bid depository,
16 or to any member or agent thereof to effectuate a collusive or
17 sham bid.” bid.

18 “I declare under penalty of perjury under the laws of the State
19 of California that the foregoing is true and correct and that this
20 declaration is executed on _____[date], at _____
21 _____[city], _____[state].
22
23

24 _____
25 [signature of authorized representative of bidder]”

26 SEC. 6. Section 7111 is added to the Public Contract Code, to
27 read:

28 7111. (a) Public entities may make changes in construction
29 contracts for public improvements in the course of construction
30 to bring the completed improvements into compliance with
31 environmental requirements or standards established by state and
32 federal statutes and regulations enacted after the contract has
33 been awarded or entered into. The contractor shall be paid for the
34 changes in accordance with the provisions of the contract
35 governing payment for changes in the work or, if no provisions
36 are set forth in the contract, payment shall be as agreed to by the
37 parties.

38 (b) (1) Where authority to contract is vested in any public
39 entity, excluding the state, the authority shall include the power,

1 by mutual consent of the contracting parties, to terminate, amend,
2 or modify any contract within the scope of such authority.

3 (2) Paragraph (1) shall not apply to contracts entered into
4 pursuant to any statute expressly requiring that contracts be let or
5 awarded on the basis of competitive bids. Contracts of public
6 entities, excluding the state, required to be let or awarded on the
7 basis of competitive bids pursuant to any statute may be
8 terminated, amended, or modified only if the termination,
9 amendment, or modification is so provided in the contract or is
10 authorized under provision of law other than this subdivision.
11 The compensation payable, if any, for amendments and
12 modifications shall be determined as provided in the contract.
13 The compensation payable, if any, in the event the contract is so
14 terminated shall be determined as provided in the contract or
15 applicable statutory provision providing for the termination.

16 (3) Contracts of public entities may include provisions for
17 termination for environmental considerations at the discretion of
18 the public entities.

19 SEC. 7. No reimbursement is required by this act pursuant to
20 Section 6 of Article XIII B of the California Constitution for
21 certain costs that may be incurred by a local agency or school
22 district because, in that regard, this act creates a new crime or
23 infraction, eliminates a crime or infraction, or changes the
24 penalty for a crime or infraction, within the meaning of Section
25 17556 of the Government Code, or changes the definition of a
26 crime within the meaning of Section 6 of Article XIII B of the
27 California Constitution.

28 However, if the Commission on State Mandates determines
29 that this act contains other costs mandated by the state,
30 reimbursement to local agencies and school districts for those
31 costs shall be made pursuant to Part 7 (commencing with Section
32 17500) of Division 4 of Title 2 of the Government Code.